UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Howard Hines, et al., Civil No. 4-73-387 PJS/AJB

Plaintiffs,

v.

Wendell Anderson, et al.,

Defendants.

THIRD REPORT AND RECOMMENDATION ON MOTION TO TERMINATE CONSENT DECREE

This action is before the Magistrate Judge, Arthur J. Boylan, on defendants' motion to terminate the medical care consent decree that was issued in May 1977, pursuant to Order by United States District Court Judge Earl Larson. Hines v. Anderson, 439 F.Supp. 12 (D. Minn. 1977). Hearing on the motion was held on July 24, 2006, at the U.S. Courthouse, 180 East Fifth Street, St. Paul, MN. The magistrate judge previously issued a report and a recommendation that this motion be denied on grounds that the court lacks jurisdiction in the absence of a case or controversy in which adverse interests can be properly presented. The district court adopted the report and recommendation and the motion to terminate the consent decree was denied without prejudice. Defendants appealed the decision to the Eighth Circuit Court of Appeals and the matter was thereafter remanded to the district court for consideration on the merits of the motion.[1] The district court was also instructed to appoint counsel to represent the plaintiff prisoner class.

By Order dated February 20, 2004, Mary R. Vasaly, Esq., was appointed to represent

[1] Unpublished court of appeals opinion dated December 15, 2003 [Docket No. 591].

the class for the limited purpose of responding to the motion to terminate the consent decree and any appeals that may follow from the district court's decision. Defendants are represented by Jennifer A. Service, Esq., Assistant Attorney General in the Office of the Attorney General for the State of Minnesota. The matter has been referred to the magistrate judge for report and recommendation under 28 U.S.C. §636(b)(1).

A second report and recommendation was submitted to the district court on November 4, 2004, therein recommending that defendants' motion to terminate the Hines consent decree be granted.[2] The plaintiff class filed objections to the magistrate judge's report and recommendation, and hearing on the objections was held by the district court. Thereafter, an order[3] was issued in which the district court expressly stated that evidence currently before the court was not sufficient to support prolonging the existence the consent decree. However, the court declined to rule on the termination of the consent decree pending remand of the action to the magistrate judge with instructions that plaintiffs be allowed to engage in additional discovery and be provided the opportunity to present evidence of ongoing Eighth Amendment violations at MCF–Oak Park Heights ("OPH").[4]

The magistrate judge issued a Scheduling Order dated February 1, 2005,[5] allowing the parties to engage in traditional discovery to include interrogatories and depositions at defendants'

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[2] Report and Recommendation on Motion to Terminate Consent Decree dated November 4, 2004 [Docket No. 699].

[3] Memorandum of Law & Order dated January 14, 2005 [Docket No. 707].

[4] Id., page 6.

[5] [Docket No. 711].

expense. Plaintiffs were subsequently granted permission to retain an expert witness to be paid by defendants.[6] Individual prisoners were not allowed to conduct independent discovery, but were permitted to file *pro se* submissions with respect to the motion to terminate the consent decree. Also, counsel for the plaintiff class, counsel for the defendants, and the magistrate judge and staff toured the medical facilities ("TCU") and segregation area at MCF–Oak Park Heights on February 25, 2005.

Supplemental memorandums and exhibits on the motion to terminate the consent degree have been filed with the court, and numerous submissions by individual prisoners have been received in the form of conventionally filed declarations. Therefore, the Report and Recommendation on Motion to Terminate Consent Decree dated November 4, 2004 is **hereby withdrawn** [Docket No. 699], and the present Report and Recommendation on Motion to Terminate Consent Decree is **substituted** as the magistrate judge's submission to the district court. This Report and Recommendation essentially incorporates the discussion contained in the prior report and further addresses the survival of the consent decree in light of the additional discovery that has taken place since the prior report was issued.

HISTORY AND BACKGROUND

This case was commenced in 1973 by inmates at the Minnesota State Prison in Stillwater, Minnesota. The complaint alleged that medical facilities and medical care at the prison were inadequate and the deficiencies constituted violations of the Eighth Amendment of the United States Constitution. Hines v. Anderson, 439 F. Supp. 12 (D. Minn. 1977). Ultimately the immediate dispute

[6] Order on Motion to Appoint Expert dated July 27, 2005 [Docket No. 727].

was resolved by negotiation and agreement to entry of a consent decree addressing medical care issues raised in the suit, without admission by any party as to any issue. Hines v. Anderson at 15. The action was litigated on behalf of the named plaintiffs and all others similarly situated, and the plaintiff inmates were represented by counsel. The Order and Consent Decree was issued by the Court, United States District Court Judge Earl R. Larson, on May 27, 1977. The decree provided for application of the "Patients' Bill of Rights," Minn. Stat. §144.651, to inmates receiving medical treatment at the Minnesota State Prison. DeGidio v. Perpich, 612 F.Supp. 1383, 1387 (D. Minn. 1985). In addition, the Hines decree established certain guidelines, requirements and limitations with respect to providing medical care and treatment for prison inmates, and further addressed issues relating to maintenance of appropriate and adequate health care staffing and facilities, special dietary needs of certain prisoners, confidentiality of inmate medical records, and availability of health care services to segregated prisoners. The consent decree also contains a provision whereby individual prisoners may challenge prison authorities' noncompliance with terms of the decree by contempt motion. Hines v. Anderson at 24. Following implementation of the decree in 1977, until 1996, there were no prisoner motions seeking enforcement of particular provisions of the consent decree and there were no formal prisoner allegations of contempt by prison officials under the decree. However, significant claims which encompassed allegations of Hines consent degree violations were asserted in a case brought under 42 U.S.C. §1983 arising out of a tuberculosis outbreak at MCF–Stillwater during the early 1980s.[7] Since

[7] The Hines v. Anderson consent decree was considered and discussed in an action entitled DeGidio v. Perpich, 612 F.Supp. 1383 (D. Minn. 1985). See also DeGidio v. Pung, 704 F.Supp. 922 (D.Minn. 1989) and DeGidio v. Pung, 920 F.2d. 525 (8th Cir. 1990).

February 1996, and particularly since enactment of the Prison Litigation and Reform Act (PLRA),[8] there have been numerous pro se contempt motions commenced by prisoners alleging an array of consent decree violations by prison officials.[9] The various motions have included, *inter alia*, medical and dental care claims, claims relating to dietary needs, and assertions that privacy and confidentiality rights have been violated. With the exception of claims that prison personnel failed to abide by certain consent decree instructions involving documentation of medical care requests by prisoners in segregation, contempt motions have been uniformly denied on their merits. Defendants now move to dissolve the Hines v. Anderson consent decree on grounds that the decree is essentially terminated as a consequence of enactment of the Prison Litigation Reform Act.

Consent Decree

A consent decree is an executory form of relief that remains subject to later developments and therefore is not necessarily the last word with respect to a particular case. Gavin v. Branstad, 122 F.3d 1081, 1087 (8th Cir. 1997). In the present case, the executory nature of the Hines

[8] The PLRA at 28 U.S.C. § 1915(b) provides that prisoners who are granted IFP status for purposes of bringing a civil action in federal court are not altogether excused from paying court filing fee. Ashley v. Dilworth, 147 F.3d 715, 716 (8th Cir. 1998) ("[t]he purpose of the [PLRA] was to require all prisoner-litigants to pay filing fees in full, with the only issue being whether the inmate pays the entire filing fee at the initiation of the proceeding or in installments over a period of time"). Prisoners bringing contempt actions under the Hines consent decree are not required to pay filing fees or establish that they are entitled to proceed *in forma pauperis* under terms of the PLRA or otherwise, though many contempt motions are essentially independent civil rights actions within the umbrella of the Hines v. Anderson case.

[9] Since March 1999, the consent decree has been applied only to the Minnesota Correctional Facility at Oak Park Heights, Minnesota, and only prisoners at MCF–Oak Park Heights have been permitted to proceed on contempt motions under the decree. Order dated March 29, 1999 [Docket No. 217]. See Hines v. Anderson, 439 F.Supp. 12, 23 (D. Minn. 1977).

v. Anderson consent decree is made manifest by a number of mandates that specified procedures be followed and particular staffing requirements be satisfied indefinitely, and this executory aspect is further evidenced in the provision allowing prisoners to bring contempt motions to compel enforcement of substantive terms of the decree. The Commissioner for the Minnesota Department of Corrections now moves for termination of the Hines consent decree pursuant to 18 U.S.C. §3626(b), a provision of the Prison Reform Litigation Act which provides for termination of prospective relief in civil actions relating to prison conditions.[10]

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[10] 18 U.S.C. §3626(b) states:

> **(1) Termination of prospective relief.–(A)** In any civil action with respect to prison condition in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener–
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> (i) 2 years after the date the court granted or approved the prospective relief;
> (ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or
> (iii) in the case of an order issued on or before the date of enactment of the Prison Reform Litigation Act, 2 years after such date of enactment.
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> **(B)** Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).
>
> **(2) Immediate termination of prospective relief.**—In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.
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> **(3) Limitation.**—Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

Motion Claims

The Commissioner for the Minnesota Department of Corrections ("DOC") asserts in this motion that the Hines consent decree is properly terminated pursuant to both 18 U.S.C. §3626(b)(1)(A)(iii) and 18 U.S.C. §3626(b)(2). Section 3626(b)(1)(A)(iii) provides that orders for prospective relief with respect to prison conditions issued before enactment of the PLRA shall be subject to termination on motion brought two years after the enactment. The Commissioner contends that the Hines consent decree is clearly an order providing prospective relief as to prison conditions and more than two years have passed since the PLRA was enacted in 1995. Section 3626(b)(2) provides that an order granting prospective relief as to prison conditions can be immediately terminated if not accompanied by findings that the relief is narrowly drawn, extends no further than necessary to correct the violation of a Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The Commissioner argues that the Hines decree contains none of the findings required to avert immediate termination and further insists that the relief provided under the Hines consent decree is not narrowly drawn and is not the least intrusive means necessary to ensure that medical care at OPH is adequate to satisfy Eighth Amendment standards.

In opposition to termination of the consent decree the plaintiff inmates explicitly acknowledge that the cited provisions of the PLRA provide grounds for termination which are applicable in this instance, but assert that the limitation provision at 18 U.S.C. §3626(b)(3) precludes termination of the consent decree if the court makes written findings, based upon the record, that prospective relief

remains necessary to correct an ongoing violation of a Federal right and the relief is not overly broad or overly intrusive. The prisoners contend that evidence exists to support findings that ongoing constitutional violations are indeed occurring and that continuation of the consent decree is necessary to correct the such violations of Federal rights. Alternatively, plaintiffs argue that the court should order that a comprehensive expert review of the prison medical care system be undertaken.

18 U.S.C. §3626(b)(3)

The parties do not dispute that the Hines consent decree is an order for prospective relief in a civil action relating to prison conditions; that the order was issued before enactment of the PLRA and more than 2 years have passed since the PLRA was enacted; and that the issuing court did not make the particularized findings required under the termination provision, 18 U.S.C. §3626(b). Consequently, survival of the Hines decree is contingent upon the creation of written findings by the Court which are based upon a record that establishes that the prospective relief remains necessary to correct an ongoing violation of the Federal right being addressed, that the relief extends no further than necessary to correct a violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation. 18 U.S.C. §3626(b)(3). The requisite written findings do not presently exist in this matter, though plaintiffs insist that such findings are justified and ought to be made by this Court.

Necessary to Correct an Ongoing Violation of a Federal Right

The introduction to the Hines consent degree states that the original complaint alleged claims "upon which relief may be granted against the Defendants under 42 U.S.C. Section 1983 and the 8th and 14th Amendments to the Constitution of the United States." Hines v. Anderson, 439 F. Supp. at

15. Both the plaintiffs and the defendants have argued this motion from the perspective that the right of prisoners to adequate medical and health care, as reviewed under Eighth Amendment standards, is the Federal right being considered in the case. The immediate issue can therefore be somewhat more particularly stated as whether the consent decree is necessary to correct on ongoing violation of Eighth Amendment rights relating to medical care at MCF–Oak Park Heights.

Previous Prisoner Motions. Since February 1996, well over 50 motions for relief have been filed by prisoners seeking substantive relief under the Hines consent decree. These motions have predominantly been motions for contempt, but also include motions for injunctive relief and various other motions seeking specific relief. In addition, there have been numerous motions relating to procedural matters, including motions for appointment of counsel, motions for discovery, and motions for application of the consent decree at other Minnesota prison facilities. In no motion has a prisoner shown that prison authorities were in contempt of the consent decree or that he was otherwise entitled to relief on substantive claims relating to actual medical care. Nonetheless, in two instances the Court determined that the defendants had failed to abide by requirements of the decree with respect to forms used by segregation prisoners to request medical assistance,[11] and in response to another motion the Court ordered that the Hines Order and Consent Decree be published and posted inside the prison at MCF–Oak Park Heights.[12] As a measure of the extent of ongoing violations of medical care responsibility of Minnesota prison authorities, the past record of complaints of consent degree violations obviously shows some amount of dissatisfaction on the part of prisoners, but offers virtually no support

[11] Orders dated August 23, 1999 [Docket No. 242], and March 5, 2002 [Docket No. 385].

[12] Order dated August 14, 2001 [Docket No 357].

whatsoever for the contention that there are ongoing violations of the Eight Amendment for which the Hines decree offers protection and relief.

Prior Court Decision. Meanwhile, plaintiffs contend that support for the claim of ongoing violation is to be found in a case arising out of a tuberculosis outbreak at MCF–Stillwater in the early 1980s. Following a thirty-one day trial in that case, the district court found that the response by prison authorities to a tuberculosis outbreak which began in 1982, and continued into 1986, exhibited deliberate indifference to the serious medical needs of inmates. DeGidio v. Pung, 920 F.2d 525, 528 (8th Cir. 1990)(citing DeGidio v. Pung, 704 F.Supp. 922, 959-60 (D.Minn. 1989)). The Eighth Circuit Court of Appeals affirmed the finding of deliberate indifference but also affirmed the district court's finding that Eighth Amendment violations had been effectively alleviated as a result of substantial improvements in screening and control practices at Stillwater prison. With respect to claims of Hines consent decree violations that were alleged in the DeGidio lawsuit, the court of appeals also affirmed the district court's determination that the consent decree did not create a liberty interest which had been taken away without due process and further found that the decree is remedial in nature and does not purport to create substantive rights. DeGidio v. Pung, 920 F.2d at 534-35.

The DeGidio case provides no support for the plaintiffs' position on the motion now before the Court. The case relates to factual circumstances that existed approximately 20 years ago at an entirely different institution, MCF–Stillwater. Although consent decree violations were found to have existed, it was expressly held that substantial improvements had been made in providing for the serious medical needs of Stillwater inmates, and Eighth Amendment violations which had existed were effectively alleviated, albeit in response to the lawsuit. DeGidio v. Pung, 920 F.2d at 528. Plaintiffs do not

reference any subsequent cases which would evidence the existence of institution-wide violations of civil rights with respect to medical treatment for prisoners at either MCF–Stillwater or MCF–Oak Parks Heights, and the record with respect to alleged consent decree violations belies the contention that pervasive and on-going Eighth Amendment violations are occurring. In addition, the successful prosecution of the DeGidio matter as a civil rights action under 42 U.S.C. §1983 establishes that the Hines consent degree is not a 'necessary' avenue for enforcement of prisoner rights with respect to medical treatment under the Eighth Amendment because §1983 provides a means to obtain relief.

MEDICAL CLAIMS AND EVIDENCE

Individual Prisoner Claims

Numerous prisoners at MCF–Oak Park Heights have submitted declarations in opposition to the motion to terminate the consent degree which were briefly discussed in the magistrate judge's prior report and recommendation and are here again acknowledged by recognition of the respective individual's particular medical treatment experience, or observation. Pursuant to the court's order allowing additional written submissions by individual prisoners following remand to the magistrate judge for further discovery, a number of additional prisoner declarations have been filed with the court, including second declarations by inmates who repeat previously asserted claims. The prisoner declarations are offered to support the contention that the Minnesota Department of Corrections has failed to attend to serious medical needs of prisoners at MCF–Oak Park Heights. Medical care at OPH is provided by Correctional Medical Services, Inc. ("CMS") pursuant to contract with the Minnesota

DOC.[13] Although declarations by C.K. and D.R. contain the bare allegation that CMS spends as little as possible on medical care and saves costs by employing unqualified nurses and physicians, for the most part the declarations are focused on the ongoing medical treatment problems, or deaths, of particular inmates, and/or challenge the fairness of the medical services $3.00 co-pay requirement.

Initial Inmate Declarations[14]

Each of the individual prisoner declarations are briefly addressed herein by reference to inmate initials. Any second declaration by a particular prisoner is later discussed with reference to the earlier declaration. Furthermore, to the extent that several inmates have made concrete allegations regarding medical treatment, in most instances defendants offer administrative and medical records which clarify the circumstances and often directly contradict the prisoner assertions.

Inmate **A.F.** asserts that he has pain in his feet which requires surgery and he also has a cyst on his back which likewise causes pain and should be surgically removed. Requests for surgery have been denied and the conditions are being monitored [Docket No. 643]. Defendants submit a letter and medical records indicating that A.F. had been receiving physical therapy and was provided braces and orthotics for chronic foot and ankle problems.[15]

Inmate **C.H.** states that he has been known to have a low white blood count since his intake exam in 2001, but that medical staff has not determined the cause, though a bone marrow biopsy

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[13] Affidavit of Nanette M. Schroeder, Exh. A [Docket No. 440].

[14] Inmate declarations are subject to a post-Report and Recommendation sealing stipulation and order [Docket Nos. 738-739].

[15] Affidavit of Kathryn V. Reid [Docket No. 673]. Exh. D and Exh. E.

was conducted in April 2004. C.H. also indicates that he experiences pain, discomfort, and loss of sleep as the result of an inguinal hernia which has gone untreated because the condition is not considered to be life threatening [Docket No. 644](further addressed in the Affidavit of Mary R. Vasaly, ¶ 17 [Docket No. 642]). Defendants offer medical consultation records showing that the patient's white blood count had been monitored consistently and noting on August 27, 2003, that his white blood count had been stable for several years.[16]

Inmate **L.J.** asserts that he has Hepatitis C and is not given treatment because he is not eligible under "Hepatitis C Treatment Eligibility Criteria and Antiviral Treatment Guidelines [Docket No. 669]."

Inmate **J.M.** states that he has Hepatitis C and is not given treatment because he is not eligible under the specified policy guidelines [Docket No. 646].

Inmate **M.S.** states that he has Hepatitis C and has been refused treatment because he is not eligible under specified the Minnesota Department of Corrections guidelines [Docket No. 647].

Inmate **D.N.** asserts that he has Hepatitis C and is not given treatment because he is not eligible under the policy guidelines [Docket No. 648].

Inmate **R.L.** states that he is diabetic, but is not supported in his efforts to self-treat through diet and exercise. R.L. also states that he has been refused treatment for Hepatitis C and that routine dental care is withheld from prisoners like himself who are in segregation [Docket No. 649]. A letter was sent to R.L. expressly advising him that he needed a physician's specific recommendation for

[16] Affidavit of Kathryn V. Reid Exh. I.

the exercise regimen he wanted.[17]

Inmate **D.C.** asserts that he was diagnosed with Hepatitis C while in prison but was not promptly informed and has been refused treatment for the hepatitis and possible liver damage pursuant to the eligibility guidelines [Docket No. 650]. Defendants submit test reports purporting to show that D.C. has not had consistently elevated liver function results.[18]

Inmate **P.G.** states that he has high blood pressure and is not always able to get prescriptions promptly refilled [Docket No. 651]. Defendants offer medication administration reports indicating that P.G. received blood pressure medication at regular intervals.[19]

Inmate **D.W.** asserts that he broke his hand and was not offered appropriate treatment, resulting in a deformed hand and constant pain [Docket No. 652]. Defendants submit medical consultation and treatment notes indicating that D.W. was treated for a broken hand.[20]

Inmate **I.K.** states that he is diabetic and despite requests he is given no treatment for a long-term bruise on his right leg which causes him concern, but not pain, and pain in right foot which causes him to have concern for his circulation and the possibility that amputation would someday be required [Docket No. 653]. Defendants provide medical consultation notes indicating that a thigh bruise and a foot and toe problem had been medically evaluated.[21]

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[17] Id. Exh. A.

[18] Affidavit of Kathryn V. Reid, Exh. J.

[19] Id. Exh. K.

[20] Id. Exh. P.

[21] Id., Exh. O.

Inmate **D.H.** asserts that spots have been detected on his liver, but that OPH medical staff have refused to allow a biopsy as recommended by a hospital physician, instead relying upon a diagnostic blood test [Docket No. 654].

Inmate **D.H.** makes several assertions suggesting that prison medical authorities were not diligent in providing surgical relief for an inguinal hernia and that post-operative care for a surgical wound drainage problem was deficient. D.H. also contends that he has not received proper treatment for an eye condition and associated eye pain [Docket No. 655](further addressed in the Affidavit of Mary R. Vasaly [Docket No. 642, para. 16]). Defendants submit an eye specialist examination note dated January 12, 2004, indicating that the patient had stable ocular health, and evidence indicating that he was referred for hernia surgery evaluation as soon as the hernia was no longer reducible, and he had no complaints of abdominal pain, nausea, vomiting, bowel difficulties or fevers or chills.[22]

Inmate **J.C.** states that he has Hepatitis C and is not provided treatment because he is not eligible under policy guidelines [Docket No. 657].

Inmate **S.D.** indicates that he has a lump on his left breast and that despite recommendations of prison physicians he was not given a mammogram until more than seven months after the lump was first detected [Docket No. 658]. Defendants present medical consultation notes and hospital reports indicating that S.D. had been referred and had been given a mammogram which resulted in a finding of no evidence of malignancy.[23]

Inmate **C.K.** states that he has been diagnosed with an enlarged prostrate which causes

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[22] Affidavit of Kathryn V. Reid, Exh. B and Exh. C.

[23] Id. Exh. L, M, and N.

him to experience deep pelvic pain and that masses in the area of his testicles have also been noted, but that a prison doctor has refused to order surgery and has refused to refer him to a urologist for evaluation and treatment [Docket No. 659]. Defendants submit a letter, consultation notes, and hospital records evidencing significant treatment for C.K.'s prostrate condition.[24]

Inmate **D.R.** states that he suffers from severe migraines which could be prevented or alleviated by timely administered medication, but that as a result of staff shortages he is sometimes refused medications at times other than those preset for delivery of medications [Docket No. 660]. Defendants submit a medications list, medical consultation entries, and a letter indicating that migraine medications were prescribed and made available to this inmate.[25]

Inmate R.B. reports that in April 2002, another prisoner, **A.B.** complained to a prison nurse that he was ill. The following day A.B. complained of difficulty breathing and vomiting blood and that when a nurse came to get a vomit sample the nurse merely threw a container into the cell where A.B. was lying on the floor, unable to move. The next day A.B. was taken from the complex in a wheelchair and the following day he died. [Docket No. 656].

Inmate Declarations on Remand[26]

E.H. is a licensed practical nurse who was temporarily employed at MCF–Oak Parks Heights during 2004. E.H. reports her observations regarding an incontinent elderly prisoner in the nursing home wing as to whom she asserts that proper perineal care was not being provided and did not

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[24] Id. Exh. Q, R, and S.

[25] Affidavit of Kathryn V. Reid, Exh. F, G, and H.

[26] Declarations filed under seal.

received prompt attention when he was in severe respiratory distress and possibly suffering a heart attack. The inmate subsequently died. E.H. also generally alleges improper conduct by nursing staff, including withholding medications and kicking an inmate [Docket No. 743].

Inmate No. 1 asserts that he has a painful lump on his breast that he asked to have examined in April 2005. The lump was examined on May 27, 2005, and blood was drawn. In June and July 2005, the prisoner submitted kite inquiries seeking pain medication and information regarding the breast lump. He filed a grievance in that regard on June 3, 2005. In response to the grievance the inmate was advised that all lab tests had been performed and results were within normal limits. By way of appeal of the grievance response the inmate thereafter asked that the lump be removed. The appeal was denied and the prisoner was advised that surgery is rarely indicated for the condition, i.e. gynecomastia, and it usually resolves itself over time. Nonetheless, the appeal decision noted the absence of any indication that the inmate had been told of the probable cause of the lump or a course of care to resolve the condition. He was subsequently told that no plan of care was recommended (Decl. Exh. A-H) [Docket No. 744]. Defendants offer medical treatment notes indicating that gynecomastia was monitored on a regular basis, and that a mammogram conducted on March 6, 2006, showed that the growth on his breast was benign.[27]

Inmate No. 2, J.C., submits a second declaration in this matter in which he again notes that he has Hepatitis C and is not provided treatment because he is not eligible under policy guidelines. He also complains that a mattress that had been provided to him to prevent back pain arising from a

[27] Third Affidavit of Kathryn V. Reid [Docket No. 786], Exh. A.

degenerative disk disease was taken from him, and he does not promptly receive medication for sinus headaches (Decl. Exh. A-B) [Docket No. 745]. Defendants present a medical authorization dated July 6, 2005, allowing the extra mattress based upon a results of a radiology report received by Dr. Craane on June 24, 2005.[28]

Inmate No. 3 alleges that he was provided eyeglasses when incarcerated at MCF–St. Cloud in 2003, but that he experienced headaches which he relates to the glasses, and his request to see an eye doctor since being transferred to OPH has been denied on the basis of DOC policy requiring him to wait two years before obtaining another eye examination [Docket No. 746]. Defendants submit medical reports to show that the inmate was given an eye examination of April 13, 2005, and he received new glasses on May 31, 2005.[29]

Inmate No. 4 states that he has high blood pressure and suffers from severe headaches for which OPH medical staff kept changing his medications. He woke up in the hospital after experiencing cardiac arrest on May 30, 2005. He was placed in the OPH medical care facility for physical therapy after discharge from the hospital, but he had not since seen a therapist and continued to have heart problems [Docket No. 747]. Defendants have produced medical records which clearly evidence the inmate's refusal to accept recommended treatments for high blood pressure, including medications. In addition, the prisoner was provided prompt emergency room treatment for a respiratory issue in June 2005, as well as follow up visits with OPH medical staff. Finally, plaintiff has had several attempts at physical therapy to reduce his reliance on a wheelchair, though success has been quite

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[28] Id. Exh. B.

[29] Third Affidavit of Kathryn V. Reid, Exh. C.

limited.[30]

Inmate No. 5 objects generally to the $3 co-pay policy, particularly with respect to circumstances in which prisoners must sign up for sick call, and pay the fee, merely to obtain dry skin lotion or continually needed medications for chronic conditions such as thyroid problems and high blood pressure. The prisoner contends that blood pressure checks should be more readily available and that the nurse should be required to give prior notice when she intends to visit the segregation unit so that prisoners could indicate the existence of any problems (Decl. Exh. A-B)[Docket No. 748]. Administrative notes provided by DOC establish that the inmate himself refused blood pressure checks in July and August 2005, but that several blood pressure checks were indeed performed between October 2005, and March 2006. He also received medication renewal, albeit with requirement for sick call appointments and presumably a co-pay.[31]

Inmate No. 6, A.F., submits a second declaration in which he again cites the existence of a painful feet condition and a cyst on his back which causes him pain. However, the prisoner also states that an MRI was done on his feet in April 2005, and surgery to remove bone spurs on one of his feet was done in September 2005 (Decl. Exh. A-C)[Docket No. 749]. Defendants again reference a letter and medical records indicating that A.F. had been receiving physical therapy and was provided braces and orthotics for chronic foot and ankle problems.[32] Defendants further note the inmate's own declaration statement that surgery was performed on one foot, and states that the condition of the right

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[30] Id. Exh. D.

[31] Third Affidavit of Kathryn V. Reid, Exh. E.

[32] Second Affidavit of Kathryn V. Reid [Docket No. 673]. Exh. D and Exh. E.

foot continues to be monitored.[33]

Inmate No. 7, P.G., submits a second declaration in which he repeats his assertion that refills of blood pressure medications are not always provided promptly. He also objects to the requirement for a $3.00 co-pay for a sick call visit each time he needs a refill or asks for information on medication side effects (Amd. Decl. Exh. A-B) [Docket No. 750 and No. 775]. Defendants present progress notes indicating that the prisoner was advised that a sick call appointment was needed to obtain a renewal of his Atenolol prescription and that he thereafter refused to attend several appointments to see the doctor.[34]

Inmate No. 8 states that he experiences recurring dislocated shoulder, but that CMS will not authorize surgery required to correct the problem. The prisoner believes that this inaction constitutes deliberate indifference to his serious medical needs [Docket No. 751]. Defendants put forth clinic notes showing that the shoulder condition has been given considerable medical attention; the prisoner's full compliance with physical therapy recommendations is medically questioned; his shoulder condition does not prevent the inmate from participation in basic activities of daily living; the actual severity of the reported recurrent dislocations, which the inmate often self-corrects, is questioned; and incidents of dislocation could be reduced by avoidance of high-level, vigorous activities and sincere compliance with therapy recommendations.[35]

Inmate No. 9, D.H., submits a second declaration in which he again challenges the

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[33] Third Affidavit of Kathryn V. Reid, ¶ 7.

[34] Third Affidavit of Kathryn V. Reid, Exh. F.

[35] Id. Exh. G.

DOC's refusal to perform a liver biopsy to determine whether he has liver cancer. The prisoner also asserts that respondents have been deliberately indifferent to his medical needs by delaying the immediate provision of physical therapy for back pain arising out of a deteriorating disk [Docket No. 752]. Radiology and practitioner reports presented by defendants establish that a doctor reviewed November 22, 2005, x-rays with the inmate on December 14, 2006, and that D.H. received physical therapy, as well as exercise recommendations, in February and March 2006. With regard to liver functioning tests, an ultrasound examination of liver lesions, not biopsy, was recommended,[36] and that the prisoner's liver functioning is being monitored by blood tests, a medically acceptable alternative to ultrasound exam.[37]

Inmate No. 10, D.H., submits a second declaration regarding delays in providing surgical treatment for an inguinal hernia. He also complains about the $3.00 co-pay required for renewal of an eye drop prescription every 90 days; the refusal by OPH segregation security staff to allow him to use a "theraband," an elastic exercise band used by the prisoner for therapy on injured shoulders; inability to see a dentist while in segregation; inadequacy of food servings; and refusal to provide food to take along with ibuprofen that is prescribed by shoulder pain. The prisoner asserts that his experiences reflect deliberate indifference to his serious medical needs (Decl. Exh. A) [Docket No. 753]. Medical records submitted by defendants show that the inmate has since received authorization to use a theraband for one hour per day while housed in the Administrative Control Unit, though he was

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[36] Third Affidavit of Kathryn V. Reid, Exh. H.

[37] Second Affidavit of David Paulson, ¶ 3.

previously denied use of the band for security reasons.[38] Previous submissions indicated that the hernia had been surgically corrected.

Inmate No. 11, L.J., submits a second declaration in which he repeats his prior contention that he is being denied proper treatment for Hepatitis C and/or liver cirrhosis, and he alleges that the DOC's treatment criteria demonstrates deliberate indifference to his serious medical needs (Decl. Exh. A-B) [Docket No. 754]. Defendants' medical consultation notes indicate that the prisoner has Hepatitis C, but that the current level of inflammation does not warrant Interferon treatment under DOC policy, and that a liver biopsy in December 2003, revealed no cirrhosis, i.e. fibrosis, of the liver.[39]

Inmate No. 12 states that he suffers from a seizure disorder which was not revealed due to the lack of medical screening upon his transfer to OPH. As a result he was prescribed an improper medication and he had a seizure, leading to a head laceration which now leaves him with a scar and recurring headaches. He contends that the failure to review his medical history constitutes deliberate indifference to his serious medical needs (Decl. Exh. A) [Docket No. 755]. Defendants acknowledge that the inmate was inappropriately prescribed Wellbutrin, but he was promptly taken off the medication after suffering a seizure in January 2004. Defendants further advise that this inmate was prescribed Wellbutrin, and suffered the seizure, while incarcerated at MCF–Rush City, prior to being transferred to OPH.[40]

Inmate No. 13 alleges that he is not provided mental health treatment for his

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[38] Third Affidavit of Kathryn V. Reid, Exh. I.

[39] Third Affidavit of Kathryn V. Reid, Exh. J.

[40] Id. Exh. K.

depression, and that examination and antibiotic treatment for ear infections was delayed (Decl. Exh. A-J) [Docket No. 756]. Medical consult notes indicate that the inmate was prescribed antibiotics for ear infection in January 2005, and again in September 2005. There was an inadvertent delay on one week in the delivery of medication in September, but the Amoxicillin was provided promptly upon receipt of a kite from the prisoner.[41] With respect to mental health issues, this inmate has had many encounters with mental health staff at OPH, including evaluations, counseling, and simple cell checks. He has not been receptive to treatment or medications for depression and is not considered to be a candidate for a residential treatment program.[42]

Inmate No. 14 states that he suffers from asthma and that while at OPH he was prescribed an ineffective substitute inhaler, Flovent, rather than a more expensive and effective inhaler, Advair, for more than a year, until the prescription was finally changed to Advair in January 2005 [Docket No. 757]. Medical consult notes show that the prisoner did indeed have difficultly obtaining a fully effective inhaler; but he was not denied medication, his asthma condition was regularly monitored by medical staff, and he ultimately obtained his preferred inhaler.[43]

Inmate No. 15 states that he has a history of unstable mental health and that in June 2005, he inserted an ink pen cartridge under the skin of his left arm, but that the doctor at OPH would not remove the cartridge. The object was removed approximately three weeks later, after causing significant pain and the arm had become infected. He alleges that the doctor and medical staff were

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[41] Id. Exh. L.

[42] Affidavit of Peter Puffer [Docket No. 787].

[43] Third Affidavit of Kathryn V. Reid, Exh. M.

deliberately indifferent to his serious medical need [Docket No. 773]. Practitioner notes indicate that the prisoner was given medical attention and that a physician observed the arm and determined that removal was not necessary unless the area became infected or the object was manipulated to a more vital area. The ballpoint pen cartridge was surgically removed when the inmate complained of severe pain.[44]

Inmate No. 16 states that he has a history of kidney failure and receives dialysis at OPH. He alleges that nursing staff and the dialysis technician are inattentive and make mistakes during dialysis, and they do not properly wash their hands before handling equipment, thereby increasing his vulnerability to infection. In addition, nurses have allowed blood to clot in the dialysis machine, creating an chance of life-threatening embolism, and they do not properly clean up body fluid spills. The prisoner contends that actions of medical staff constitute deliberate disregard of his serious medical needs (Decl. Exh. A-F) [Docket No. 758]. Defendants assert that as a result of this report the inmate was interviewed and an investigation was conducted with regard to his concerns, and that the matters were subsequently discussed with the dialysis service provider and dialysis staff. Consequently there has been increased supervision of dialysis staff.[45]

Inmate No. 17 indicates that he has a severe allergy to metals which requires that he use a special trimmer set, and that he also needs medication for hyperthyroidism. The prisoner contends that the trimmer was withheld from him upon transfer to OPH in January 2005, until March 2005, and the refills of his hyperthryroidism medication have been withheld for periods of 30 days and 8 days and that he has been required to pay a $3.00 co-pay to renew his thyroid prescription. He alleges that the

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[44] Id. Exh. N.

[45] Third Affidavit of Kathryn V. Reid, ¶ 17.

failure to provide medications constitutes deliberate disregard of his serious medical needs (Decl. Exh. A-B) [Docket No. 759]. Defendants acknowledge that the prisoner did not receive timely refills of Synthroid in April 2005 and September 2005, but state that the errors were promptly corrected when discovered and the inmate suffered no adverse health affects.[46] The inmate was allowed a special razor to accommodate his metal allergy about two months after his transfer to OPH.

Inmate No. 18 states that he has brain damage and headaches as the result of a severe beating. He often has a difficult time getting pain medication and blood pressure medication refills on a timely basis and is required to make a $3.00 sick call co-pay. He alleges that the failure to timely provide medications represents deliberate indifference to his serious medical needs (Decl. Exh. A-N) [Docket No. 760]. Defendants' exhibits establish that there were delays in obtaining refills of Indocin on two occasions between December 2003, and the present, both times due to errors with respect to pharmacy orders. The medication was ordered as soon as the error was discovered.[47]

Inmate No. 19 is no longer incarcerated at OPH, but nonetheless submits a declaration stating that he has Hepatitis C but was not provided treatment until he sued the DOC. He asserts that even then the DOC cut corners by using expired medications and treatment schedules were sometimes interrupted. He further alleges that federal prisoners were given treatment preference, and that the medical staff was inadequately trained to administer Hepatitis C treatment and required him to perform his own injections. Nonetheless, the declarant indicates that he is presently virus free [Docket No. 761]. Defendants assert that offenders who are able to self-inject are given training and notes that the inmate's

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[46] Id. Exh. O.

[47] Third Affidavit of Kathryn V. Reid, Exh. P.

claim that he received no training in self-injection is wholly unsupported.[48]

Inmate No. 20 is no longer a prisoner at OPH, but he now states that he has asthma. He alleges that he was required to use an inhaler that made his condition worse, and he suffered a series of asthma attacks when a nurse essentially ignored his breathing problems. The prisoner complains that prescription refills were not timely provided and that the DOC's refusal to treat his asthma was in deliberate disregard to his serious medical needs [Docket No. 762]. Defendants observe that the inmate identifies no specific instance of a delay in obtaining asthma medication and that records show timely delivery of refill medications. The declarant inmate did not provide the dates on which he suffered asthma attacks, but records show that he was seen by a nurse for possible asthma related dizziness on May 12, 2005.[49]

Inmate No. 21 alleges that he received a possibly incorrect positive result on a tuberculosis test at OPH in February 2005, and rather than being retested, he was required to undergo nine months of high dosage Isoniazid treatment. Although a side effect of such treatment is possible liver damage or death, DOC never monitored his liver enzyme levels. He alleges that the failure to monitor liver functioning constitutes deliberate indifference to his serious medical needs (Decl. Exh. A-C) [Docket No 763]. Defendants assert that the inmate was tested and treated appropriately after giving a positive result on a Mantoux test for tuberculosis[50] and that the actions were consistent with DOC policy

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[48] Id. ¶ 31.

[49] Third Affidavit of Kathryn V. Reid, Exh. Q.

[50] Id. Exh. R.

on the prevention and treatment of tuberculosis in offenders[51] and in accordance with Centers for Disease Control and Prevention recommendations.[52]

Inmate No. 22 is a former OPH prisoner who complains that DOC refused his request for a Hepatitis B vaccination, even after he offered to pay for it himself, and he was also unable to obtain a dental examination. He was able to get a Hepatitis B vaccination, as well as a dental exam after being transferred to MCF–Stillwater. He contends that his care at OPH demonstrates that the staff was deliberately indifferent to his serious medical needs (Decl. Exh. A-B) [Docket No 764]. Defendants assert that Hepatitis B vaccinations are provided by the DOC at no cost to prisoners who have a high probability of contact with the virus, but that there have been fewer than five cases of Hepatitis B in the entire DOC system in the previous six years, and none at OPH.[53] In addition, the prisoner was formally advised that the logistics of the vaccinations make it impractical to vaccinate inmates who are a low risk.[54]

Inmate No. 23 states that he has been diagnosed with scleroderma and pneumocystitis, conditions which require that he be provided oxygen. He alleges that prison administration at OPH has failed to stock sufficient oxygen, causing him to run out, and that nurses try to limit and discourage his oxygen usage. He also asserts that necessary pain medications often are not provided at a reasonable time and that nurses have been slow to respond to other treatment problems, including a bleeding wound

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[51] Third Affidavit of Nanette M. Larson [Docket No. 789], Exh. A.

[52] Fourth Affidavit of Jennifer A. Service [Docket No. 785], Exh. C.

[53] Third Affidavit of Nanette M. Larson, ¶¶ 3-4.

[54] Declaration of Inmate No. 22, Exh. B.

(Decl. Exh. A-C) [Docket No. 765]. The DOC cites the inmate's failure to provide the dates of specific incidents to which a response could be made, and correctly notes the absence of evidence in the medical records describing occasions on which the prisoner was unable to obtain oxygen or prescribed medications. With respect to bleeding from a chest tube site, a nurse contacted the on call pulmonologist who advised that the bleeding was not a concern unless it was profuse and the patient was transferred to a hospital the following day when conditions warranted such action.[55]

Inmate No. 24 indicates that he has a painful and deteriorating knee condition due to injury, but that his DOC referral for knee replacement surgery has been declined by CMS. He was later approved for knee replacement surgery, only to receive a recommendation from an outside surgeon that he first undergo conservative treatment with Synvic shots. Disagreement arose regarding the patient's eligibility for Synvic shots, whether CMS would pay for such treatment, and whether DOC would permit the treatment even if the prisoner offered to make payment himself. Ultimately, DOC agreed to allow the Synvic injections. The prisoner contends that the failure to treat his knee condition, in light of the extended period of pain and disability, showed deliberate disregard for his serious medical needs (Decl. Exh. A-G) [Docket No. 766]. Defendants offer medical reports indicating that delays in injection treatment were a largely a consequence of the prisoner's own indecision, based in part upon the possible effects of the treatments for an ocular condition. In any event, he began receiving Synvic injections on March 9, 2006.[56]

Inmate No. 25 states that he has a painful and growing hernia which the DOC has

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[55] Third Affidavit of Kathryn V. Reid, Exh. S.

[56] Third Affidavit of Kathryn V. Reid, Exh. T.

refused to surgically repair. He also alleges that medical staff would not provide treatment for his eyes after he was sprayed with chemical irritant, and he objects to a $3.00 co-pay charge for a visit in which he was provided no medical attention. The inmate asserts that the refusal to treat his chemical injury and to provide hernia surgery is in deliberate disregard of his serious medical needs [Docket No. 767]. Defendants acknowledge that the prisoner was sprayed with a chemical irritant by security staff, but contend that the irritant was washed off by shower following the incident and the prisoner was advised to rinse his eyes in the sink if irritation persisted. He called for a nurse later that night, and she advised him to use a cool cloth on his eye after being shown a small spot of blood on a pillow and hearing a complaint of continued soreness. There was no further request for medical treatment and there is no objective evidence to support the claim of swollen and scabbed eyes.[57]

Inmate No. 26 contends that medical staff did not give prompt attention to his complaints of abdominal pain which turned out to be an infection that required removal of his gall bladder. He alleges that the conduct of medical staff represents a deliberate disregard for his serious medical needs [Docket No. 768 and No. 780]. The inmate filed a second declaration alleging that he experienced a scalp infection as a result of the nursing supervisor's refusal to exchange his razor, though a boil was subsequently lanced and he was given antibiotics [Docket No. 781]. In addition, the prisoner filed another declaration in which he expresses general concerns with OPH medical staff's failure to provide appropriate treatment for his diabetes, refusal to perform a liver biopsy based upon a Hepatitis C diagnosis, and staff failure to advise him when medications are due to expire and to promptly provide

[57] Third Affidavit of Kathryn V. Reid, Exh. U.

refills. He contends that the conduct of medical staff represents a deliberate disregard for his serious medical needs (Amd. Decl. Exh. A-I) [Docket No. 776]. Defendants submit evidence showing that the prisoner was promptly transferred from the prison hospital unit where he was being housed, to St. Joseph's Hospital, when he complained of abdominal pain. Also, contrary to other claims by the prisoner, he was regularly provided blood glucose tests.[58]

Inmate No. 27 alleges that he has a torn knee ligament, and although the knee has been x-rayed and an MRI was recommended, the CMS doctor refused to authorize an MRI or other further treatment for the knee. He asserts his belief that the DOC is deliberately disregarding his serious medical needs (Decl. Exh. A-B) [Docket No. 769]. Defendants submit medical consultation notes which document the knee problems but further show that the inmate refuses to take medication for pain, persists in an exercise regimen (running) that aggravates the condition, and refused a physical therapy evaluation which is required before an MRI will be performed.[59]

Inmate No. 28, D.W., is a former OPH prisoner who again asserts in a second declaration that he broke his hand and was not offered appropriate treatment, resulting in a deformed hand and constant pain [Docket No. 770]. Defendants again refer to medical consultation and treatment notes indicating that D.W. was treated for a broken hand.[60] Defendants further assert a physician's opinion that it is medically inappropriate to place a broken hand in a cast before swelling has abated.[61]

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[58] Id. Exh. V.

[59] Third Affidavit of Kathryn V. Reid, Exh. W.

[60] Second Affidavit of Kathryn V. Reid, Exh. P.

[61] Affidavit of Stephen J. Craane, ¶ 7.

Inmate No. 33 states that he experiences severe migraines from bright lights, but that OPH guards refused to allow him to wear tinted prescription glasses. When he complained to medical staff in March and April 2005, his successive requests for a sick call appointment and medical records were put off and he was told that he could not see an eye doctor for more than a year. He alleges that the medical staff's deliberate disregard for his serious medical needs resulted in his unnecessarily suffering migraines (Decl. Exh. A-H) [Docket No. 771].[62]

Inmate Reverend Beck submits a Supplemental Brief in Opposition to Terminate Consent Decree/Affidavit and Memorandum of Law in Support of, by Movant Reverend Beck Ph.D. The prisoner therein states his position and argument relating to termination of the consent decree and expresses his disapproval of counsel appointed for the inmates [Docket No. 778].

Inmate Loner Blue submits the Supplemental Brief of Loner Blue in Opposition to Motion to Terminate the Consent Decree in which he asserts his opposition to termination of the consent decree and alternatively seeks appointment of a team of independent special masters to investigate the health care system at all MN-DOC facilities. He further describes his personal dental problems, high blood pressure treatment, and delays in getting medical attention in segregation, and he expresses his agreement with the argument and conclusion of plaintiff's appointed counsel. Mr. Blue encloses his original kites to medical staff, with responses, that were written through 2005, and into February 2006.

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[62] Defendants did not directly address claims by Inmate No. 33 in their reply to the plaintiff's memorandum and declarations in opposition to dismissal of the consent decree. Defendants discussed repetitive claims by Inmate No. 29 and Inmate No. 30 by reference to exhibits attached to the Second Affidavit of Kathryn V. Reid which indicate that Inmate No. 29 had received mammograms which showed a breast tumor to be benign (Exhs. M and N.), and that Inmate No. 30 had been given a bone marrow test and a treatment plan (Exh. I).

Particular Health Care Issues

In addressing matters relating to the delivery of health care services at OPH, plaintiffs focus on particular health care issues with ancillary reference to the experiences of individual prisoners, whereas defendants have directed their discussion to each inmate's medical claims as noted above. By presenting argument in this manner plaintiffs essentially assert the same individual health care experiences, as embellished by deposition testimony of prison medical staff personnel, in an effort to persuasively present evidence to establish that access to medical professionals at OPH is inadequate because nursing staff often fails to respond in a timely fashion to inmate kites seeking prompt medical attention or emergency medical assistance; pills are not distributed in a manner that effectively addresses the medical needs of prisoners; segregation inmates simply do not have sufficient contact with nursing staff; the primary doctor at OPH is not full-time and is unfamiliar with many DOC health services policies; inmate medical conditions, particularly in restricted units, are often assessed by nurse practitioners rather that a doctor; and many nursing positions are left unfilled. Plaintiffs assert that care at the OPH Transitional Care Unit, or infirmary, is insufficient in light of its high occupancy rate and short staffing, and it is further alleged that inmates have been kicked, medications have been withheld, and calls for help have been ignored. In addition, plaintiff cite examples in which receipt of medications has been delayed due to requirements that prisoners place medical requests in writing and that they sign up for sick call, with concomitant co-pay.

Other specific claims of deficient health care include the allegation that psychiatric/psychological screening and treatment is inadequate, and OPH fails to abide by standards of care established under DOC policy and the Hines decree; the DOC improperly restricts inmate access

to medically necessary pain medication; the $3.00 co-pay requirement effectively limits prisoner access to medications needed for chronic conditions, and inmates are not properly advised as to impending medication expirations; eligibility for Hepatitis C treatment is overly restrictive; hernia repairs are unnecessarily delayed; there was failure to note a seizure disorder on transfer from another facility; biopsies of possible tumors and suspected cancer tissues is often delayed; inmates are denied certain asthma medications due to cost; medical staff has breached standards of care and cleanliness with respect to administration of kidney dialysis; timely dental care is not provided; inmates are denied access to medical treatments for which they are willing to pay themselves; prisoners are not given access to adequate eye care; pain medications are not distributed effectively; proper and timely physical therapy is not provided; prisoner high blood pressure is not properly monitored; diabetes is not adequately monitored; allergies are not properly acknowledged and treated; and surgeries or other remedies for orthopedic problems are denied to prisoners.

Expert Opinion

In opposition to termination of the Hines consent decree the prisoners further offer the report[63] of Roderic Gottula, M.D., an expert retained on behalf of the plaintiffs to render opinions regarding health care provided to inmates at OPH.[64] The report indicates that it is based upon limited review of inmate medical records and kites, review of depositions of prison medical personnel, review of

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[63] Affidavit of Mary R. Vasaly, Exh. 48.

[64] The expert was retained pursuant to the Court's Order dated July 27, 2005 [Docket No. 727], whereby plaintiffs were permitted to retain an expert, at defendants' expense, not to exceed $7,000, but not including deposition or court appearance fees. In his report the expert asserts that his evaluation was somewhat superficial due to the funding limit of $8,000 and the consequent inability to spend adequate time interviewing offenders, health care staff and custody staff.

portions of the Hines decree containing the Bill of Rights, inmate interviews, and an on-site visit which included conversations with prison staff. Mr. Gottula described his understanding of the kite system through which inmates make requests for medical care, noting that the system was somewhat confusing and was not well-designed to ensure patient confidentiality or to preserve a thorough medical record of adequate care. He did not express the opinion that constitutional violations were occurring at OPH, but he recommended further investigation based upon the abrasive and sometimes non-responsive nature of medical staff responses to prisoner kites.

Mr. Gottula next acknowledged that the practice of charging a $3 co-pay was a prerogative that was used by most correctional facilities to cut down on frivolous medical visits by offenders, but he felt some "uneasiness" with regard to the possibility that the co-pay requirement may impede prisoner access to medical care. Though he also disputes the propriety of charging a co-pay to prisoners who suffer chronic conditions, the expert makes no charge of ongoing constitutional violations with regard to co-pay.

Upon examining records in three cases in which the resident OPH physician, Dr. Craane, had requested specialty consultations which were not approved, Mr. Gottula questioned whether the prisoners might not have received a better outcome if the particular matters had been handled by specialists, but notes that he was not provided all the consultation records and information he requested, and no opinion was offered as to the constitutional significance of the denial of specialist consults.

Mr. Gottula next noted the recent emergence of Hepatitis C as a public health issue and his awareness the Minnesota Department of Corrections had developed treatment eligibility guidelines

for the disease. However, he noted that he did not have the opportunity to review those guidelines, and did not have a list of Hepatitis C positive inmates at OPH. Consequently, he was unable to compare or consider circumstances at OPH in light of national guidelines for Hepatis C treatment and no opinion was rendered with respect constitutional concerns.

Other issues addressed by the expert include his determination that Quality Improvement programs and projects had not taken place recently or with any regularity at OPH, and that this shortcoming was a major flaw in the QI program for the DOC, but no Eighth Amendment significance is attached. Mr. Gottula states that the reported four suicides in the last three years at OPH is more than he would expect in a facility of its size, but he draws no conclusions about the deaths or their relationship to the quality of medical care. The expert briefly discusses the DOC's policy on providing mental health treatment for prisoners in segregation and he speculates that the policy is not being followed, but he further acknowledges that the failure to follow policy does not by itself indicate deliberate indifference to the medical needs of mentally ill offenders. He states that the infirmary appeared to be adequately staffed, though nurse staffing may not be adequate to handle nighttime emergencies.

In inmate interviews Mr. Gottula found high dissatisfaction with OPH medical services among the 17 randomly selected prisoners with whom be spoke, particularly noting complaints about delays in getting medication, receiving the wrong medication, co-pay requirements, rude treatment by nursing staff, and delays in being seen by medical staff. Again however, the expert drew no strong conclusions as to the reason for the apparently negative environment, and he offers no opinion having constitutional significance.

Finally, Mr. Gottula appears to question whether Minnesota's prisoner health care

funding is adequate in light of its relatively low per capita spending on corrections; comments on his inability to conduct adequate interviews in light of the limited expert witness allocation; and generally indicates that he found several instances of what he considered to be substandard care and staff failures to adhere to the DOC's own policies.

The ultimate opinion expressed in the expert's report was that "a team composed of a medical physician, psychiatrist, dentist, nurse and/or health care unit, who have access to medical/mental health records, QI reports, M&M reviews, outside consultation reports, staffing ratios and face to face interviews with offenders, health care staff and custody staff," would be required to adequately assess the quality of care provided at OPH. However, this "conclusion" does not provide the court with either a factual basis or an expert opinion that would assist the court in determining whether current and ongoing Eighth Amendment violations were taking place at OPH. Of course the court would not be bound by an expert's legal conclusion as to whether a particular incident, event, or circumstance represented deliberate indifference to the serious medical need of a prisoner or prisoners, but in this instance, the expert's report and conclusion provides no evidentiary basis or expert opinion whatsoever that would support the conclusion advanced by the plaintiffs. Indeed, the strongest comment offered by the expert is that he had found several examples of substandard care.

Deliberate Disregard/Indifference to Serious Medical Needs of Prisoners

In discussion relating to the first set of prisoner declarations in its November 4, 2004, report and recommendation the magistrate judge noted that the declarations did not directly allege ongoing violations of either the Eighth Amendment in general or the Hines consent decree in particular. Many prisoners apparently attached significance to that mere observation and therefore decided to

include the allegation in later declarations. In fact, the court's statement in that regard, as well as the various prisoners' repetition of the comment, has neither procedural nor evidentiary significance in this matter. In any event, the record established through individual prisoner complaints does not represent evidence in support of ongoing violation of Eighth Amendment rights to medical care with respect to medications, co-pays, or treatment.

The Eighth Amendment prohibits the infliction of cruel and unusual punishment on prisoners. In order to state a cognizable claim with respect to medical treatment, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. Estelle v. Gamble, 429 U.S. 97, 106; 97 S.Ct. 285, 292 (1976); Davis v. Hall, 992 F.2d 151, 152 (8th Cir. 1993). The "deliberate indifference to a serious medical need must rise to the level of an unnecessary and wanton infliction of pain." Jorden v. Farrier, 788 F.2d 1347, 1348 (8th Cir. 1986). Failure to treat a medical condition is not punishment under the Eighth Amendment unless officials knew that the condition created excessive risk to the prisoner's health and then failed to act on that knowledge. Dulany v. Carnahan, 132 F.3d 1234, 1239 (8th Cir. 1997)(citing Long v. Nix, 86 F.3d 761, 765 (8th Cir. 1996)).

The court fully appreciates that no prisoner is endeavoring or is required to formally allege a self-sufficient Eighth Amendment claim in this case. However, the inmate submissions can be construed as an effort to show that, at least in a cumulative sense, serious problems exist at MCF–Oak Park Heights with respect to providing for medical care for prisoners at the facility. In that regard, the court finds that the 'evidence' presented is entirely inadequate to establish the existence of an ongoing violation of a federal right and is likewise unpersuasive as support for a contention that further discovery

(beyond the additional discovery already allowed) would bring such evidence to light. The history of individual prisoner claims as presented through past Hines decree motions and through the affidavits and declarations offered in the current motion simply does not justify a formal written finding that ongoing or recurring Eighth Amendment violations are occurring at MCF–Oak Park Heights and termination of the Hines consent decree is appropriate on that ground alone. Plaintiffs themselves have presented absolutely no direct evidence of acts or omissions that rise to the level of unnecessary and wanton infliction of pain, and evidence taken as whole, i.e. including defense submissions, precludes any inference of acts of such nature. With regard to co-pay, there is no evidence in the record, and indeed no allegation, that any prisoner has been denied access to necessary medical care on account of an inability to pay the $3.00 co-pay. Furthermore, despite his "uneasiness" with the co-pay requirement as applied at OPH, the plaintiffs' expert did not attach any constitutional implications to the co-pay policy.

Narrowly Drawn and Least Intrusive Relief

As an additional condition for survival of the consent decree, 18 U.S.C. §3626(b)(3) also mandates a written finding that the prospective relief under the decree is narrowly drawn and the least intrusive means to correct the violation. Of course, such a secondary finding presumes that there is a violation, a circumstance that the court does not find here in the first instance. Nonetheless, with regard to the scope of the Hines decree the defendants argue that the decree is broadly drawn and addresses matters far removed from Eighth Amendment medical care issues, including purely administrative concerns and procedures that are unnecessarily complex and intrusive or are simply outdated. Plaintiffs, on the other hand, insist that the DOC has not presented evidence to establish that the consent decree goes further than necessary towards imposing reasonable health care standards.

Plaintiffs also contend that in the event that court finds the decree to be overly broad and intrusive, it should simply be modified.

The Hines v. Anderson consent decree was drafted and implemented to provide relief with respect to a wide range of medical care issues and obviously without anticipation that 18 U.S.C. §3626(b) would be enacted some 18 years later as part of the Prison Litigation Reform Act. In addition to applying a broadly constructed "Patients' Bill of Rights"[65] to inmates who receive medical care at the Minnesota State Prison,[66] the decree recites specific non-medical grounds which cannot provide a basis for denial of necessary medical care, including inmate status, indigency, and impending release.[67] The decree requires medical examinations for new inmates, to include specified tests and procedures.[68] The Hines decree mandates that indigent inmates be provided free prosthetic devices where medically indicated; that inmates be allowed to participate in public mass immunizations programs; and that inmates be provided the opportunity to have exit medical examinations and private examinations at their own expense.[69] In addition to establishing a general outline for when medical care must be provided, the consent decree contains medical staffing requirements, prison 'sick call' and visitation schedules, and prohibitions against interference with the delivery of medical care to inmates.[70] Next, the consent decree

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[65] Minn. Stat. §144.651.

[66] Hines consent decree, Section VI.A.1. Hines v. Anderson, 439 F.Supp. 12.

[67] Id., Section VI.A.2.

[68] Id., Section VI.A.4.

[69] Id., Section VI.A.4-8.

[70] Id., Section VI.B.

describes the types of surgical procedures that may be performed at the prison, requires that sterile equipment and supplies be available, references a number of recent health care facility improvements and upgrades that were to be maintained, and provides that certain safety checks and inspections be conducted.[71] The Hines consent decree recognizes St. Paul–Ramsey Hospital Security Unit as the location at which primary medical care for inmates would be available, subject to changes in circumstances.[72] The consent decree contains a provision relating to confidentiality of inmate medical records,[73] a provision requiring that medically prescribed diets be prepared and delivered to inmates in need of them and that food be prepared under sanitary conditions,[74] and a provision designed to ensure that segregation prisoners are able to obtain prompt medical services.[75] Finally, the decree contains miscellaneous relief whereby only qualified medical personnel with appropriate job descriptions are to be employed at the prison; proper power, heating, and ventilation are to be provided; inmates with contagious conditions are to be isolated; and infirmary 'quiet cells' are essentially prohibited.[76]

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[71] Id., Section VI.C. Infirmary improvements and conditions to be maintained included furnishing hospital beds and mattresses, window screen repairs, a signaling system for bedridden inmates, a fire alarm system, new lighting fixtures, fire doors, and an infirmary clear of waste and combustible materials.

[72] Hines consent decree, Section VI.D. St. Paul–Ramsey Hospital no longer exists. At present MCF–Oak Park Heights prisoner requiring hospitalization are typically taken to St. Joseph's Hospital in St. Paul, Minnesota. Affidavit of Nanette M. Schroeder, para. 13 [Docket No. 440].

[73] Id., Section VI.E.

[74] Id., Section VI.F.

[75] Id., Section VI.G.

[76] Id., Section VI.H.

The Hines v. Anderson consent decree is the antithesis of a narrowly constructed, minimally intrusive statement pursuant to which prospective relief is provided at MCF–Oak Park Heights. To be sure the decree focuses upon medical care and medically related concerns, but within that subject matter the consent degree is broad and comprehensive, addressing concerns that are certainly related, but largely ancillary to core Eighth Amendment medical treatment issues. On its face the Hines decree is not narrowly drawn to address a particularized medical problem that existed at the time, but rather, "the class in Hines is broadly defined, and the consent decree covers the topic of medical care generally." DeGidio v. Perpich, 612 F.Supp. 1383, 1387 (D.Minn. 1985). The determination that the consent decree is not narrowly drawn and is not the least intrusive means to correct a particular violation of a Federal right provides sufficient and independent grounds for termination of the Hines consent decree pursuant to 18 U.S.C. §3626(b)(2), and precludes findings that might preserve the consent decree under 18 U.S.C. §3626(b)(3).

Due Process

Plaintiffs have argued that the Hines consent decree constitutes a property interest and that their right to procedural due process precludes termination of the decree absent the opportunity to conduct discovery and to present evidence at hearing. Contrary to plaintiffs' position, however, prisoners have no vested rights in the prospective relief offered by a consent decree and the PLRA's immediate termination provision therefore does not deprive them of a property interest without due process of law. Gavin v. Branstad, 122 F.3d 1081, 1091 (8th Cir. 1997). In particular, the PLRA itself creates no property right in the Hines decree under plaintiffs' proposition that the decree cannot be terminated if the previously discussed termination-limiting criteria are satisfied because the court simply

does not find that criteria are met with respect to either the existence of ongoing violations or the scope of the relief. Also, even in the event that 18 U.S.C. §3626(b)(3) could be applied to avert immediate termination of the consent decree, the relief offered would be no less prospective and no more entitled to recognition as a property right. Furthermore, the PLRA's termination provision is rationally related to a legitimate governmental interest in promoting principles of federalism, security, and fiscal restraint in the context of correctional facilities, and the statute is therefore not an arbitrary and irrational enactment which could arguably be construed as an impairment of contract. Id. at 1091. Plaintiffs have no property interest in the Hines consent decree which would invoke a due process right to hearing with respect to termination of the decree under the PLRA.

State Court Remedy

In their previous opposition to termination of the consent decree plaintiffs asserted the claim that the Hines consent decree is a valid contract under Minnesota state law and that prisoners should retain the ability to enforce their contractual rights in the Minnesota state courts. Plaintiffs simultaneously acknowledged that the federal consent decree itself cannot be enforced by a state court. Defendants correctly point out that enforcement of contract rights in the Minnesota state courts is not a matter that is properly before this court and any opinion on the issue would be entirely advisory. Under these circumstances the court declines to weigh in on the question.

Discovery, Investigation, and Modification

In ruling upon the previous report and recommendation on motion to terminate the consent decree the district court explicitly determined that perpetuation of the Hines consent decree could not be justified on the existing evidentiary record, but that a decision on whether to terminate the

decree would be deferred to permit further discovery regarding the existence on ongoing Eighth Amendment violations at OPH.[77] To that end the plaintiff was permitted to engage in discovery and evidence gathering by traditional discovery means, including service of interrogatories and document production requests, as well as conducting depositions.[78] Plaintiffs were also permitted to retain an expert at defendants' expense, albeit with a limited budget.[79] In addition, inmates were again permitted to submit declarations and supporting documentation relating to their individual medical care claims.

As discussed above, the court's file in this case contains numerous prisoner contempt motions alleging violations of the consent decree since 1996, none of which were sustained in the sense that substantive violations of the right to medical care were found. Furthermore, and particularly significant with respect to a claim of current and ongoing Eighth Amendment violations, a substantial number of prisoner affidavits and declarations have been filed in opposition to the present termination motion, none of which are sufficient to justify a contempt finding on a claim that there are ongoing violations of the consent decree or a finding of a violation of the Eighth Amendment right to necessary medical care at OPH. Indeed, it could reasonably be argued that it is the personal medical experiences of prisoners that ought to provide the nuts and bolts evidentiary basis for the court's decision on whether to terminate the consent decree. That evidentiary record does not support a finding that continuation of the consent decree is necessary to correct a current and ongoing violation of a federal right or is the least intrusive means to correct the violation. In essence, plaintiff's have not identified a particular current and

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[77] Memorandum of Law & Order dated January 14, 2005

[78] Scheduling Order dated February 1, 2005 [Docket No. 711].

[79] Order on Motion to Appoint Medical Expert dated July 27, 2005 [Docket No. 727].

ongoing violation of a federal right, though they continue to steadfastly argue that an in depth investigation might reveal such a violation or, at least, would expose the inadequacies in the provision of health care at OPH. Plaintiffs' expert, Dr. Gottula, provided a report that noted certain medical care deficiencies at OPH, but he did not direct the court to any evidence and he expressed no opinions that would cause the court to conclude that the provision of medical care at OPH was substandard to a degree that the Eighth Amendment rights of prisoners was being violated in any regard, much less in any broad-based, institution-wide sense.

The factual record in this case reveals instances of delay in providing medication or services to particular inmates, indicates the existence of disagreements between patients and staff regarding medical treatment, indicates that errors have been made by OPH medical staff in the delivery of medical care, and would support a finding that the OPH medical department is moderately understaffed. However, the record is woefully lacking in facts to support a determination that are specific and serious deficiencies in medical services to inmates at OPH. There is no evidence that appropriate measures are not taken to prevent communication of any particular diseases or afflictions, and prisoner disagreement with DOC medical treatment policies regarding various conditions does not justify a determination that either the policy or the provided treatment were substandard to the extent of an Eighth Amendment violation. This is essentially the conclusion of plaintiffs' expert, Dr. Gottula, who nonetheless suggests that a cross-discipline team of medical professionals be appointed to review records, interview inmates and staff, and provide an assessment of the quality of medical care at the facility. However, as this court has previously observed, neither the evidence before the court, nor the statutes now being applied in this matter, 18 U.S.C. §3626(b)(1)(A)(iii) and 18 U.S.C. §3626(b)(2),

justify an open-ended fishing expedition to uncover any yet unidentified pervasive and ongoing violations of prisoner constitutional rights with respect to medical care at OPH. Likewise, neither the statutes nor the factual record provide a basis for modification of the Hines consent decree to address the present state of health care at OPH. Moreover, the court finds no basis for plaintiffs' rank speculation that termination of the decree will result in an utter lack of supervision over the provision of medical care at OPH and that health care standards at OPH will significantly deteriorate in absence of the Hines decree. An order for comprehensive investigation on the provision of medical treatment and services at OPH, or for modification of the Hines consent decree, is not warranted on the motion or circumstances now before the court.

RECOMMENDATION

The Magistrate Judge hereby **recommends** that defendants' Motion to Terminate Consent Decree be **granted** [Docket No. 438], and that the medical care consent decree that was issued in May 1977, pursuant to Order by United States District Court Judge Earl Larson, Hines v. Anderson, 439 F.Supp. 12 (D. Minn. 1977), be terminated.

Dated: January 29, 2007

s/ Arthur J. Boylan
Arthur J. Boylan
United States Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties, written objections which specifically identify the portions of the Report to which objections are made and the bases for each objection. This Report and Recommendation does not constitute an order or judgment from the District Court and it is therefore not directly appealable to the Circuit Court of Appeals. Written

objections must be filed with the Court before February 13, 2007.